

The Appeals Board has jurisdiction to review the issue of whether claimant's accidental injury arose out of and in the course of his employment. However, the Administrative Law Judge has the authority to grant or deny temporary total disability

benefits as a result of a preliminary hearing and, therefore, the Appeals Board does not have jurisdiction to review that issue. See K.S.A. 1997 Supp. 44-534a(a)(2).

On May 16, 1998, claimant was working as a construction worker for the respondent in Leavenworth, Kansas. The respondent was constructing a roof on a building. Claimant was working on the unfinished side of the roof on steel beams when he fell some 28 feet and was severely injured. At the time claimant fell, he was walking backward on a steel beam spreading out a blanket of insulation in preparation for decking the roof. Roof decking had already been placed on one portion of the roof.

The claimant; his mother; claimant's foreman, Mark Springer; and a co-worker, Rex Stidham; all testified in person before the Administrative Law Judge at the August 11, 1998, preliminary hearing. Additionally, Tammy Allen, a registered nurse, and Margaret Songer, a medical technician, both employed by St. John Hospital in Leavenworth testified by deposition.

Mark Springer, claimant's foreman, testified claimant was about an hour late for work on the morning of the accident. Mr. Springer immediately noticed that claimant was slurring his words, his balance was unsteady, and he had a strong odor of alcohol. Mr. Springer testified he ordered claimant not to work on the open, steel beam, unfinished side of the roof. Mr. Springer testified he felt it was unsafe for claimant to work on the unfinished side of the roof. In fact, Mr. Springer testified he ordered claimant three separate times to go to the finished deck side of the roof and wait. Mr. Springer testified he was going to send the claimant home as soon as his boss arrived on the work site. He did not explain why he did not send the claimant home at that time or have claimant at least remove himself from the roof.

Mr. Rex Stidham, a co-construction worker of the claimant, testified he also observed the claimant slurring his words and having some balance problems on the morning of the accident. However, Mr. Stidham did not notice any odor of alcohol on claimant's breath. Additionally, Mr. Stidham testified he told Mr. Springer that he should not work on the unfinished part of the roof and he also verified that Mr. Springer told claimant not to work on the unfinished portion of the roof.

In contrast, claimant testified he was never told by either his foreman or his co-worker not to work on the unfinished portion of the roof. Claimant further testified that on the morning of his accident, he was not unsteady, he was not slurring his speech, and the only alcohol he had consumed was three beers before midnight the evening before the accident. Claimant testified he fell from a steel beam as he stumbled on a raised portion of the beam as he was backing up while spreading a blanket of insulation.

Claimant's mother testified she drove the claimant to work on the morning of the accident and claimant was not slurring his words, did not smell of alcohol, and was not unsteady on his feet.

After claimant's injury, he was transported to Saint John Hospital emergency room by Leavenworth Emergency Medical Service. Neither the records of the emergency service or emergency room had notations that claimant smelled of alcohol. Tammy Allen, one of the registered nurses who helped care for the claimant in the emergency room, testified claimant did not have an odor of alcohol, and the emergency room treatment record had no notation from the treating physician that claimant smelled of alcohol. Margaret Songer, medical technician for Saint John Hospital, identified the test results taken from an urine sample for drugs and blood sample for alcohol taken from the claimant at the time he was treated for his injuries. Ms. Songer testified that both the drug and the alcohol tests were negative. The blood test for alcohol had an alcohol concentration of less than .005.

Respondent argues that claimant's accidental injury did not arise out of and in the course of his employment with respondent because claimant was performing work specifically prohibited by the respondent at the time of his injury. Respondent contends that Mr. Springer, claimant's foreman, specifically prohibited claimant from working on the unfinished portion of the roof on the morning of the accident but claimant ignored his instructions and was injured while he continued to perform the prohibited work. Furthermore, respondent argues the law is very clear in the State of Kansas that when an employer forbids an employee from performing work, as distinguished from doing work in a forbidden manner, and he is injured, he is not acting in the course of his employment. Therefore, the claimant is not entitled to workers compensation benefits. See Hoover v. Ehrsam Company, 218 Kan. 662, Syl. ¶ 2, 544 P.2d 1366 (1976).

The Appeals Board finds the basis for respondent allegedly prohibiting claimant from performing work on the unfinished roof portion of the building was that claimant was intoxicated. The Appeals Board acknowledges claimant's foreman testified that claimant, when he arrived at work on the morning of the accident, had a strong odor of alcohol, his balance was unsteady, and he slurred his words. That testimony was corroborated by claimant's co-worker who testified claimant was slurring his words and his balance was unsteady. However, the co-worker could not verify that claimant had a strong odor of alcohol. Both claimant's foreman and his co-worker did testify that claimant was told not to work on the unfinished portion of the roof. However, there is no explanation as to why claimant's foreman did not instruct the claimant to quit work and return home since he thought claimant was intoxicated.

The Appeals Board concludes, from the evidence contained in the preliminary hearing record at this time, the medical records, the results of the blood alcohol test, and the testimony of the registered nurse who observed the claimant when he was brought into the emergency room are persuasive that at the time of claimant's accident, he was not intoxicated. In fact, before an employee is considered impaired due to alcohol, it must be shown that at the time of injury, the employee had an alcohol concentration of .04 or more. As found by claimant's blood alcohol test taken at the emergency room, claimant only had a blood alcohol concentration of .005 or less. See K.S.A. 1997 Supp. 44-501(d)(2).

The answer to the question of whether claimant's foreman prohibited claimant from working on the unfinished roof hinges on the credibility of the claimant and his foreman. Both testified in person before the Administrative Law Judge. The Appeals Board finds the Administrative Law Judge had to conclude that claimant's testimony was more credible than the testimony of claimant's foreman when he awarded claimant preliminary hearing benefits. The Appeals Board finds some deference should be given the Administrative Law Judge's conclusions in this case because he did have the opportunity to assess the credibility of those two witnesses from their in person testimony. Therefore, the Appeals Board, at this juncture of the proceedings, concludes the preliminary hearing Order of the Administrative Law Judge should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order dated August 12, 1998, entered by Administrative Law Judge Steven J. Howard, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of September 1998.

BOARD MEMBER

c: J. Paul Maurin, III, Kansas City, KS
Kip A. Kubin, Overland Park, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director